IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-720

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY RAY LEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT, BILLY RAY LEE, IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet recorded. (Pet. App. A)

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1976. A petition for rehearing was denied on October 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Petition for Certiorari was timely filed on November 22, 1976, within an extension of time granted by the Court.

RESTATEMENT OF QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the naming of a person in an application for telephone interception who is a target of a government investigation and whom the government has probable cause to believe is committing the offense and that his communications will be intercepted.

2. Whether respondent's telephonic communications were unlawfully intercepted in violation of the Fourth Amendment to the Constitution of the United States.

STATEMENT

On October 30, 1974, Frank W. Wilson, U. S. District Judge, at Chattanooga, Tennessee executed an order authorizing special agents of the FBI to intercept wire communications of Frank Rittie Wells, Calvin Howard Henley, Ernest Leon Frizzell, Willard Jesse Marchman, Raymond Leon Frizzell and others as yet unknown concerning an illegal gambling business in violation of Title 18, USC, Section 1955 to and from telephones subscribed to and by J. C. McKinney (a fictitious name) and located at Chattanooga, Tennessee and carrying telephone number (615) 886-4404, which was connected by a rotary device to (615) 886-4405 and (615) 886-4406.

The application for the order did not name the respondent as being one of the persons committing the offense and whose communications were to be intercepted. The order of the District Court did not name the respondent as being one of the persons whose communications were to be intercepted (C.A. App. 5a-32a, 33a-36a).

The respondent was indicted along with the five individuals named in the application and in the order of the District Judge for participating in a gambling business in violation of 18 USC 1955 and 2 (C.A. App. 4a, 82a).

The respondent, after a denial of his motion to suppress by the District Court, waived a jury trial and stipulated all of the facts. The District Court found respondent guilty and sentenced him to two years imprisonment and a fine of $2,500.00. All but five months and twenty-nine days was suspended and respondent placed on probation for a term of three years following the five months, twenty-nine days imprisonment.

The U. S. Court of Appeals for the Sixth Circuit, following *U. S. v. Donovan*, 513 F.2d 337 and *United States v. Kahn*, 415 U.S. 143, 39 L.Ed.2d 225, 94 S.Ct. 977, reversed his conviction, finding that he should have been named in the application and order and concluding that the failure to name him required suppression of his communications. Respondent's place of business was searched by the FBI with a search warrant issued pursuant to an affidavit based in part upon communications intercepted pursuant to the order and the Court of Appeals held that the evidence obtained in the search of his premises should have been suppressed.

Respondent contends that a reversal of *United States v. Donovan*, No. 75-212 argued October 13, 1976 would

not require a reversal of this case for the reason that the respondent was a target of the government's investigation and the government had probable cause to believe that he was committing the offense and that his communications would be intercepted. Respondent further contends that since he was a target of the investigation and his communications were intercepted without an order of the District Court that his communications were unlawfully intercepted in violation of the Fourth Amendment to the Constitution.

The record shows that the government, at the time it made application for the wire tap order, had knowledge of the following:

1. That respondent, Billy Ray Lee, was a bookmaker operating the Sportsman, 223 West Main Street, Morristown, Tennessee, with Knoxville telephone listing 615-522-3741 and Morristown telephone listing 615-586-6881, both phones being located at the Sportsman, Morristown, Tennessee. That Lee accepted wagers on sports events and furnished the daily "line" information on sports events to bettors and *other bookmakers* in East Tennessee when telephonic request was made.

2. The affidavit of FBI Agent Benton sets out facts to show that the five named Chattanooga individuals were involved in illegal gambling activities and that they were using the telephone numbers (615) 886-4404, 886-4405 and 886-4406.

3. The government reviewed telephone company records of long distance telephone calls made from Chattanooga number 615-886-4404 etc. for the period February 5, 1974, to October 4, 1974, a period of eight months. FBI Agent Benton in his affidavit attached to the application for the wire tap order stated that almost daily calls were

made from Chattanooga number 886-4404, etc. to this defendant's Knoxville number 522-3741 and to this defendant's Morristown number 586-6881.

4. A review of the telephone company records filed with the stipulation shows that sixty percent of the long distance calls made from the Chattanooga number 615-886-4404, etc. were made to this defendant's telephone numbers 522-3741 and 586-6881 during the period February 5 to October 4, 1974. That a total of 383 long distance calls were made to this defendant's two numbers during this period. These records further show that the Chattanooga individuals used the Chattanooga phone to call this defendant's two telephones during the month of February, 1974, 52 times; during March, 42 times; during April, 51 times; during May 68 times; during June, 42 times; from July 1 to July 4, 8 times; from August 5 to August 31, 40 times; during September, 72 times; and from October 1 through October 4, 8 times. Counsel was not furnished copies of records for the period July 4 to August 5, 1974, a period of thirty days.

5. FBI Agent Benton in his affidavit stated:

> "Based on my eight years' experience as a Special Agent of the Federal Bureau of Investigation, devoted primarily to gambling violations, it is known by me that in order for a bookmaker to have the best chance of making a profit and to stimulate betting activity, it is necessary for him to receive and/or to furnish the 'line' from or to another gambler. The 'line' is the point spread or odds on a sports event. I also know that the 'line' is disseminated telephonically."

6. Agent Benton's affidavit further stated:

"I know based on my experience and the experience of other Special Agents of the Federal Bureau of Investigation that in order for a bookmaker to operate a profitable business, he must accept bets telephonically. The bookmakers must also have accounts with other bookmakers from whom he receives or to whom he places lay-off bets. Lay-off bets are bets made from one bookmaker to another as insurance to cover an excessive amount of bets that he has taken on one team."

7. Agent Benton's affidavit further stated:

"I know through contacts with confidential sources and other bookmakers that Frank Rittie Wells has a daily 'line' on sporting events which is available to his customers and to other bookmakers in the Chattanooga area. Normal investigative efforts to establish the origin of his 'line' information have made with unproductive results."

ARGUMENT

The government knew that the defendant was a bookmaker operating in Morristown, Tennessee, and that he furnished "line" information to other bookmakers in East Tennessee when telephonic request was made to either of his telephone numbers 522-3741 or 586-6881.

The government knew that the five Chattanooga indidivuals, Frank Rittie Wells, et al, were engaged in an illegal bookmaking business in Chattanooga and that they used telephone numbers 615/886-4404, 886-4405 and 886-4406 to transact said business.

The government knew that it was necessary for a bookmaker to receive and/or furnish the "line" from or to another gambler and that telephones were used to furnish the "line".

The government knew that Frank Rittie Wells received the "line" daily and that he furnished it locally to bettors in Chattanooga, Tennessee, but the government did not have proof beyond a reasonable doubt of the source of Frank Rittie Wells' "line".

The government knew that Frank Rittie Wells' telephone numbers 886-4404 etc. were used almost daily to call defendant's number 586-6881 and that Wells' number was almost used daily to call defendant's number 522-3741 and that 60% of the long distance calls made from Chattanooga number 886-4404, etc. were made to this defendant's telephone during the period February 5, 1974 to October 4, 1974.

The only thing the government did not have was direct proof of the contents of the telephone conversations. Since defendant furnished a "line" to another bookmaker whenever a request was made and Frank Rittie Wells received the "line" daily, and made daily telephone calls to defendant's telephones, there was certainly probable cause to believe that defendant furnished the "line" to Frank Rittie Wells in said telephone conversations.

The affidavit of FBI Agent Benton, filed with the application, shows that the government was seeking proof of the origin of the "line" information furnished to the Chattanooga operation and that the government had probable cause to believe that respondent furnished the "line" information in said telephone conversations. The respondent was thus a principal target of the investigation.

The government in its brief in the case of *United States v. Donovan*, No. 75-212, argued October 13, 1976, admits in footnote 13, page 18 that if two or more persons are known to be using the telephone equally to commit the offense, and thus are equal targets of the investigation, all must be named.

The Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures." *Katz v. United States*, 389 U.S. 347, 19 L. Ed.2d 576, 88 S.Ct. 507, page 583 L. Ed. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment, is basic to a free society." *Wolfe v. Colorado*, 338 U.S. 25, 27, 93 L. Ed. 1782, 1785, 69 S.Ct. 1359 (1949) "The basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasion by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 18 L. Ed.2d 930, 87 S.Ct. 1727. *Berger v. New York*, 388 U.S. 41, 18 L. Ed.2d 1040, 87 S.Ct. 1873, page 1049 L. Ed.

Respondent's rights under the Fourth Amendment are personal rights. *Alderman v. United States*, 394 U.S. 165, 22 L. Ed.2d 176, 89 S.Ct. 961.

It seems to be now well settled that oral communications are protected by the Fourth Amendment. *Berger v. New York*, 388 U.S. 41, 18 L. Ed.2d, 1040, 87 S.Ct. 1873; *Katz v. United States*, 389 U.S. 347, 19 L. Ed.2d 576, 88 S.Ct. 507.

Mr. Justice Powell, in *United States v. United States District Court*, 407 U.S. 297, 32 L. Ed.2d 752, 92 S.Ct. 2125, in delivering the opinion of the Court, said:

> "The act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in Berger v. New York, 388 U.S. 41, 18 L. Ed.2d 1040, 87 S.Ct. 1873 (1967); and Katz v. United States, 389 U.S. 347, 19 L. Ed.2d 576, 88 S.Ct. 507 (1967)."

The act in 18 U.S.C. 2515 provides for the suppression of evidence obtained in violation of the requirements of the act even though the violation does not have constitutional overtones. *United States v. Giordano*, 416 U.S. 505, 40 L. Ed.2d 341, 94 S.Ct. 1820.

The act, 18 U.S.C. 2510 (11), defines "aggrieved person" as a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed. 18 U.S.C. 2518 (10a) grants any "aggrieved person" the right to move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the following three grounds:

> "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."

Mr. Justice White in *Alderman v. United States*, 394 U.S. 165, 22 L. Ed.2d 176, 89 S.Ct. 961, page 185 L. Ed. said in delivering the opinion of the Court:

"The exclusionary rule fashioned in Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1941), and Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 1081, 81 S.Ct. 1684, 84 ALR2d 933 (1961), excludes from a criminal trial any evidence seized from the defendant in violation of his Fourth Amendment rights. Fruits of such evidence are excluded as well. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-392, 64 L.Ed. 319, 321, 322, 40 S.Ct. 182, 24 ALR 1426 (1920) Because the Amendment now affords protection against the uninvited ear, oral statements, if illegally overheard, and their fruits are also subject to suppression. Silverman v. United States, 365 U.S. 505, 5 L.Ed.2d 734, 81 S.Ct. 679, 97 ALR2d 1277 (1961); Katz v. United States, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967)."

The Court in *Alderman v. United States*, supra, applied the constitutional rule adopted in *Jones v. United States*, 362 U.S. 257, 261 4 L.Ed.2d 697, 702, 80 S.Ct. 725, 78 ALR2d 233 (1960) to illegally overheard oral statements. The constitutional rule as stated in *Jones v. United States* is as follows:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else...
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant

> evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

Since the respondent was a target of the investigation, it is submitted that he was entitled under the Fourth Amendment to have a Judge determine whether or not his communications could be intercepted by the government.

The government in its brief in *Donovan v. United States*, supra, takes the position that the fact that the interception was authorized by a District Court stands on the same footing as if the interception had been made with the named target's permission, citing *United States v. White*, 401 U.S. 745 and *Hoffa v. United States*, 385 U.S. 293, 17 L.Ed.2d 374, 87 S.Ct. 408. The Court in *Hoffa v. United States*, held that the Fourth Amendment did not protect a wrongdoer's misplaced belief that a person in whom he voluntarily confides his wrongdoing will not reveal it. The Court in *Hoffa v. United States* stated that Hoffa was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. In footnote 6, the Court said:

> "The applicability of the Fourth Amendment if Partin had been a stranger to the petitioner is a question we do not decide."

The government's position overlooks the proposition that respondent also has rights under the Fourth Amendment which he has not waived by misplacing his confidence in the person to whom he communicated.

CONCLUSION

Respondent respectfully contends that *United States v. Kahn*, supra, correctly held that Title III requires the naming of a person in the application or interception order when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wire tap is sought. That if this Court should overrule *Donavan v. United States* that this Court should deny the petition for certiorari in this case for the reason that the respondent was a principal target of the investigation and for the further reason that his communications were unlawfully intercepted in violation of the Fourth Amendment.

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DECEMBER, 1976.